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ANDREW J. GRAHAM AND CHARLES B. COLLAR,

REPORTERS.

THE SOUTHERN REBELLION,

AND THE

**CONSTITUTIONAL POWERS OF THE REPUBLIC FOR ITS
SUPPRESSION,**

BY

HON. HENRY WINTER DAVIS;

AN ADDRESS DELIVERED BEFORE

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THE SOUTHERN REBELLION, AND THE CONSTITUTIONAL POWERS OF THE RE- PUBLIC FOR ITS SUPPRESSION.

An Address delivered by Hon. Henry Winter Davis, before the Mercantile Library Association of Brooklyn, Nov. 26, 1861

REPORTED BY CHAS. B. COLLAR.

MR. PRESIDENT AND GENTLEMEN OF THIS ASSOCIATION—In the corner-stone of the southern wing of the Capitol at Washington, in the handwriting of Daniel Webster, are these words: “If, therefore, it shall be hereafter the will of God that this structure shall fall from its base, that its foundation be upturned, and this deposit brought to the eyes of men, be it then known that on this day the Union of the United States of America stands firm, that their Constitution still exists unimpaired, and, with all its original usefulness and glory, growing every day stronger and stronger in the affection of the great body of the American people, and attracting more and more the admiration of the world.” That deposit is hardly ten years old. Daniel Webster has not been gathered to his fathers ten years, and that stone is rocked by the earthquake of revolution. Those institutions whose success he supposed he was announcing to a distant futurity, seem now already to be losing their hold on the affections of the people and the respect of nations abroad. Were he now called on to re-write that solemn proclamation to posterity, he would lower its lofty tone. He would say:

“The Union of the United States of America is now assailed and shaken to its foundations; their Constitution has ceased, in a great measure, to command the confidence of the people of America or the admiration of the world, and the people themselves seek after a master.”

The path of a nation in search of a master is broad enough and of varied aspect. Nations have sought him in the imperfections of their national institutions; in the madness of civil strife; at the hands of foreign intervention; in the degeneracy and corruptions of their own manners; in appeals from the ballot-box to the

sword at the bidding or for the advancement of personal ambition. The people of America now exhibit more than one of the symptoms of that fatal hunt. One great region is marching in the path of Mexico to the overthrow of a government it has ceased to control. The other great region is following in that deadly path—unconsciously perhaps, not so palpably, but not less surely, not less fatally—by the blind madness with which they throw down every barrier liberty has erected against arbitrary power, in their recklessness eagerness to preserve the integrity of the nation. They see the gulf, and think nothing too precious to fill it. They are ready to lay their liberty a sacrifice on the altar of victory.

When Daniel Webster died, American liberty looked strong and was boastful of its strength; when President Buchanan left the White House, American liberty was like Herod, eaten of worms beneath his royal robes—and ready to give up the ghost. The foundations of the constitutional edifice were already secretly sapped; the mortar was already picked from the stones; and when the judges of the Supreme Court pronounced the Dred Scott judgment, the very caryatides of the Constitution were seen to bend beneath the unusual pressure; and the whole edifice seemed, to thoughtful eyes, to rush to its ruin. The sap went on more earnestly, more vigorously; and as the catastrophe approached, all the energy and audacity seemed on the side of the assailants, all the doubt, all the hesitation, all the timidity on the side of the defenders—paralyzed at the awful aspect of the national dissolution. Then it was that the enemies of the Republic thought their day was come; they rushed openly to the assault of the breach they had been so long and so secretly preparing. In their exulting confidence they boastfully shouted:

“ York is joined to Bolingbroke,
And all your northern castles yielded up,
And all your southern gentlemen in arms
Upon his party.”

And the sovereign people thought their power doomed when breathless messengers from the South gasped out:

“ White beards have armed their thin and hairless scalps
Against thy majesty; and boys with women's voices
Speak big, and clap their female joints
In stiff, unwieldy arms against thy crown;
Even thy beadlemen learn to bend their bows
Of double fatal yew against thy state;
Yea, distaff women manage rusty bills
Against thy seat; both young and old rebel.”

Bold men thought the last day of the Republic was come. Bad men withdrew to seize their part of the dismembered heritage. Timid friends gathered round the bed of the dying patient, and talked hopefully of peaceful dissolution; and when rash men whispered, even with bated breath, of coercive remedies, they were put far off lest the shock of the suggestion might hasten the catastrophe.

And then an unaccustomed sound echoed over the land—a strange event—a new thing under the sun—American arms, pointed cannon at American breasts—American shot shattered an American fortress—American hands dragged down the standard of the Republic and boasted that they first had trailed it in the dust.

That touched a nerve of exquisite sensibility which vibrated to the heart of the nation; and it rose from its bed of death and cast off its premature grave-clothes and challenged its right to be a nation of history. From the Pacific to the Atlantic, living men stretched forth eager hands for arms to defend the Republic.

And then the people passed from atony to paroxysm in a day. Action, action was the cry!

The people were summoned to action—action upon a new theater—action upon new principles and for new purposes—action on new paths, different from the recognized and used paths over which the American people had in this generation trodden—action at the bidding of one stern and irresistible impulse that seemed for an instant—nay, for months—to blind the American people and make them forget the salutary principles of the Constitution which was framed after the experience of one revolution, and is competent to carry the nation through another revolution. They supposed, because they had not hitherto been called to deal with the great question of the suppression of insurrection—the guarantee of republican government to the States—the assertion of the supreme authority of the United States—they supposed that laws were meant for times of peace, that constitutions were only to be obeyed in courts of law—that now fury might minister arms, that wrath might be the measure as well as the instigation to what is allowable to might. The maxims of the hour, urged by the press and the people on those in power, were, “Give them as good as they send—do as they do—make those acts against which you protest the measure of your conduct—we can not afford the protection of the laws to traitors—the laws are silent in the midst of arms—necessity is above all law—the safety of the people is the

only law." And these maxims, unheard of before as American law, unheard of before upon American hustings, unheard of in the councils of legislation—I need not say never dreamed of in the courts of justice—these maxims have in a great measure ruled the Government in its dealing with the existing troubles—ruled the Government, in a great measure, in the modes in which it has attempted to deal with the great and terrible rebellion that we are called upon to suppress—ruled it, not at its own suggestion or inspiration—not against the will of the people; but the people leading the Government on, urging it on, prompting it, rejoicing over every arbitrary act, calling for more vigorous measures, when the vigor had already, in more than one instance, overstepped the bounds of law; seeing nothing but the enemy before it, and supposing that enemies of laws might be subdued by disregard of the fundamental principles of the Government. I do not think I have overstated the case.

Certainly, it is not my disposition to overstate the case. I do not know any one who is more interested—no one here, certainly, is so much interested—in the suppression of this rebellion as I am personally. You see the conflagration from the distance; it blisters me at my side. [Applause.] You can survive the integrity of the nation; we in Maryland would live on the side of a gulf, perpetually tending to plunge into its depths. It is for us life and liberty—it is for you greatness, strength, and prosperity.

If you are interested, still more am I; if illegal measures are necessary for salvation, I am more tempted than you to resort to them; and yet I desire to say that there is no circumstance connected with all the difficulties we are called upon to deal with—nothing, in my sight, so threatening in the future—nothing which I find myself so unable satisfactorily to contemplate, as the temper of the public mind in dealing with this great rebellion. Not that I have any tenderness for the parricidal hands that have lifted weapons against the heart of the nation—let them perish! [Applause.] But in their grave I do not wish to see American liberty buried. It is time that the energy of the nation, having now been aroused, her embattled hosts lining the whole border, flaming with the conflict, by whose light we read that the nation will not die a dog's death and will not perish of rottenness off the face of the earth—it becomes us now to turn our eyes to the principles upon which the contest is to be waged—to hold those in authority responsible,

not merely for energy, but for legality and constitutionality—to silence the sneer with which men are met when they recall their rulers to the limits of law and the Constitution. Let them understand that the American Government will not be so degraded in the eyes of history as to be driven to the necessity of inaugurating revolution for the purpose of suppressing insurrection.

[Applause.]

They who speak about extraordinary methods—of the necessity of usurpation—of the necessity of neglecting the “technicalities of law,” as they politely term them—the necessity of departing from all “red-tapeism,” which is the ordinary phrase to describe now the regular operations of the Government, conducted by wise men—these men must be taught (and it is for gentlemen like you to teach them) that it does not prove a man is disloyal because he thinks the Constitution better than they do, not only powerful in peace, but powerful in war; that its *ægis* is not only so broad as to protect the people in times of peace; but in the midst of civil war, the surest protection; in the face of national disaster, the surest refuge.

[Cheers.]

Let us review some of the measures which have been resorted to by the Government in the name of the suppression of the rebellion, and with the accord of the people, and see where in six months we have drifted before the storm of war. If it is usurpation, it is usurpation against a willing people. If it is illegal, it is illegality prompted by the people. But it is equally certain that the acclaim of the people is the most dangerous symptom.

We have seen in the midst of the American Republic, in the midst of the nineteenth century, after more than eighty years of republican rule, under a plainly-written Constitution—we have seen a republican administration assume the right to declare and execute martial law. We have seen a military commander in charge of a great and important district, within two months, I believe, after Congress had adjourned, issue a proclamation inaugurating, formally, martial law over two thirds of the State of Missouri—threatening with death, at the dictation of a drum-head court-martial, any one caught in arms within the district prescribed by his will. We have seen him assume the right to disregard the act of Congress ere the ink was fairly dry upon the parchment, and to confiscate property which Congress, by omitting, said could not be confiscated. We have seen (and those who have seen them must have laughed) deeds of manumission signed, “John C. Fre-

mont, Major-General-Commanding." [Applause and hisses. A cry, "Three cheers for Fremont!" and cries "For shame!"]

Free speech exists where I speak. [Tremendous applause.] I have seen tempestuous assemblies before in my day.

Nay, more, I have seen, likewise, statements that three or four freemen of America have been convicted before a court-martial in the State of Missouri, presided over by a colonel of Illinois volunteers—that is the judicial tribunal—convicted of being in arms against the United States—that is treason—and sentenced to hard labor during the war.

The President, with the advice of the chief law officer of the Government—a gentleman for whom I entertain, personally and politically, the very highest regard—has under the pressure of the emergency of the times asserted a right in the President, and the President has acted upon it in various instances, to suspend the writ of *habeas corpus*. [Applause.] And under this usurped power the President has arrested or allowed to be arrested many freemen who were not in arms, and had not been in arms, against the United States, and therefore were not fit objects of the military power vested in the President by Congress; has refused to submit the causes of their arrest to the judicial tribunal, even in New York, and has incarcerated them in fortresses that they might be out of the way of process.

We have seen a judge of the highest court of record in the District of Columbia held prisoner in his house, with a soldier marching up and down before the door, with bayonet on his shoulder. [Cries of "Serve him right!—serve him right!"]

We have not yet reached the question whether it has served him right or not. [Applause.] About the fact there is no doubt; that there was no sworn statement against him, there is no doubt; that the ordinary formalities of law were not pursued, there is no doubt. If he was guilty, let him be punished by law; if he was bearing arms, or about to bear arms, let it be known, and the world will justify the act. [Applause.]

We have seen, likewise (and when we remember that it is the middle of the nineteenth century, we may very well be startled at the very reference), we have seen at least one newspaper—probably more than one newspaper—stopped because of the character of its articles. We have seen more than one newspaper—(they do not express my sentiments)—we have seen more than one newspaper excluded from the benefit of the mails without authority of law.

We have seen a provost-marshall—the police officer of a camp—inaugurate a civil court in Alexandria, Va.; and (I presume I address not a few of the mercantile gentlemen of New York), if the papers have not again misled me, I think I saw a few days ago that the Chamber of Commerce had suggested to the President that he should vest authority in the provost-marshall to continue that illegal and usurped jurisdiction. [Cries of "Good," and applause.]

We have seen executed—as nothing of the kind has been executed in any despotic country of Europe, and with a completeness and precision, secrecy and dispatch, that would have done honor to the chief of police of France—the seizure of all the telegrams in all the telegraph-offices, from one end to the other of the American Republic, I believe, in one day. [Loud applause.]

We have seen, I believe, without any authority of law—we have seen an order from the Secretary of State, saying that no man shall leave the United States without a passport—that is, by his leave. [Renewed applause.]

Now, these things are not cast in the teeth of anybody, nor stated for the purpose of crimination. I use them historically; I use them for the lesson they teach; I use them to bring before you, men of America, where you this day stand after your republican government has been in full and blessed operation for over eighty years.

These measures have been executed without any authority of law. Some of them might have been authorized by Congress; but Congress had just adjourned without having authorized them.

Over these measures of the Executive there is a strange agreement between the friends and the enemies of the Government.

The enemies of the United States have taken the Constitution under their special protection, the more easily to destroy it. They deny the constitutionality of every measure for the suppression of the insurrection, and confound the arbitrary and the legal in one indiscriminate outcry against usurpation and oppression.

The friends of the Government apparently agree with them in their denial of the sufficiency of the Constitution for the crisis, and propose to eke out its omissions by the law of necessity.

I agree with neither of them. Both are wrong, and either view is equally fatal to the existence of the Government.

The Constitution does vest in Congress adequate power to suppress every insurrection.

The Constitution does not vest in Congress or the President arbit-

trary or unlimited power for that or any other purpose. Now, if the constitutional powers of the Government are not sufficient for the suppression of the rebellion—I mean the constitutional powers of the Government, not construed by the standard of South Carolina, but measured by the standard of Daniel Webster, measured by the standard of Henry Clay [applause], measured by the standard of Abraham Lincoln, who differs in nothing from either of those great men [applause]—if the Constitution of the United States does not confer power upon the Government to deal with a great rebellion like this, then, gentlemen, I wish you to draw your conclusion. Mine is, that the Government of George Washington has failed! [Hisses, and cries of "No!"] If the Government that he founded can not deal with the events before it, it is not an inference of logic, it is the verdict of history, it has failed. [Hisses.] And hissing don't change the verdict. [Laughter.] Or else the hiss is to be interpreted in this sense—that the Government has not failed, although it does not afford power to deal with the rebellion, which yet it is its duty to suppress. That argument is worthy of a hiss! I say, gentlemen, if the Constitution does not furnish these powers, then the people of the United States are in the face of another revolution. If you can not find, within the limits of the law written down, the mode and method by which you are to stamp out this rebellion, by what law is the President to be guided?

A VOICE—The law of self preservation.

Mr. DAVIS—That is the law of Louis Napoleon.

A VOICE—The law of military power.

Mr. DAVIS—Yes, the law of Julius Caesar—the law of the master over the slave. I do not know what you think of George Washington, but I shall not scandalize his memory by such a suggestion until, with all the lights before me, I shall have read the law he proposed for the government of the Republic, and see, with the light of experience, the rulings of the courts, the opinions of great men, and the necessities of national life, whether we can not find on the face of the Constitution, without making ourselves slaves (for it is to be a slave to be bound to obey the will of anybody beyond the limits of law)—a republican way to preserve at once the nation and the liberties of the people. [Applause.]

And I say, in the first place, that martial law, whatever else is allowed, and while in my judgment the authority vested in the United States, applied in its proper forms and described by its con-

stitutional language, is ample—I say that martial law, in any sense in which it is known to the history of the world, is something which is excluded from our system, and which we ourselves and our forefathers have been careful to exclude, because an arbitrary exercise of discretion could not be safely vested anywhere in our Government. Why, what is martial law? The people are all of them crying out for martial law. If they mean the direction of military power against armed opposition—the direction of the military power to disperse military resistance—why don't they use the language of the Constitution, and speak of “calling out the militia to suppress the insurrection?” But if they use the words “martial law,” men of the sword will interpret it in the only sense in which it is known to the history of the world; and Wellington has defined it, “It is the will of the commander-in-chief.” Does the President, of his will, possess the power to declare, to inaugurate, or to enact martial law? Unless it is the perpetual law of the Republic, it can not be enacted by him, nor declared by him, nor declared by anybody that he may authorize to declare it, because the Constitution says—and this is a war for the Constitution as well as for the Union—the Constitution says that “all legislative power herein granted is vested in Congress.” Then the President can not proclaim it. Can Congress proclaim it? Why, what is martial law? Mere will, limited by no definition—controlled by nothing except the will of the commander-in-chief—his discretion under the circumstances—his determination to allow and to forbid anything—the right to judge people by court-martial—the right to order men to be shot down by a file of soldiers for wearing a red-and-white cravat—the right to disregard the limits of the Constitution. It is blind fate. It is enacted at the dictation of necessity, and necessity owns no law. It is proclaimed in the name of the public safety—it is the annihilation of every guarantee of the public liberty. With us our Constitution, framed by George Washington, is the great safeguard of the country. The safety of the people is the supreme law; but that Constitution *is* the safety of the people—the Constitution is that supreme law. Above it there is no necessity, beyond it there is no law, outside of it there is no security. That Constitution does not use the word martial law. It does not vest authority to declare martial law anywhere, in any body, under any circumstances. It professes to provide for every necessity of national life, and it forbids martial law; for it forbids arbitrary trials, it forbids any conviction for crime but by a jury,

any trial but before the judges and courts it has provided, yet martial law has tried freemen for treason by a court martial. It forbids arbitrary confiscations of property, yet martial law has already executed arbitrary confiscations. It forbids arbitrary invasions of the right of personal freedom, yet men who had offended against no law *now* are held by martial law, and in spite of the law of the land.

Yet the Constitution has not overlooked grave crises such as that we are now passing through. It provides, under proper sanctions and with proper limitations, for such emergencies; but it carefully forbids this arbitrary discretion, which British freemen found incompatible with their safety in the hands of the king, and which our fathers knew would be *fatal* to our liberty in the hands of the President, and too dangerous to be intrusted even to the discretion of Congress. They knew what martial law was, for they rebelled against it as their English ancestors had.

Martial law is not now for the first time supposed to be necessary; it has been often imposed under that pretext in the old home of liberty, and there it has been repealed by arms and forbidden by laws written in royal blood. Martial law had been thought *necessary* to prevent the dispersion of Papal bulls or traitorous libels against the Queen. It had been thought necessary for the suppression of sundry great unlawful assemblies, that such notable rebellious persons be speedily suppressed by execution of death, according to the justice of martial law; and Charles I. had thought it necessary for his purposes to issue commissions to try not only soldiers, but other dissolute persons who might commit murder or other outrage or misdemeanor whatever—just as Fremont thought it necessary for the quiet of Missouri to suppress such outrages—by the justice of martial law. But the Commons of England, by the Petition of Right, compelled the revocation of such commissions, and forbade them for the future; because no man ought to be “judged to death but by the *laws established in the realm*.” And our fathers were fresh in this history when they formed our Constitution and incorporated among its solemn enactments these great prohibitions of arbitrary power which is the spirit of martial law.

The Commons of England had prohibited to the Crown the arbitrary right to seize the property of the subject, or withdraw his personal liberty from the cognizance of the courts even on a commitment by the special command of the king—or to try him by commission of martial law, contrary to the laws of the land;

and our fathers took from that petition their great safeguards and placed them beyond and above even the legislative will of Congress.

The Constitution declares that the "judicial power *shall* be vested in our Supreme Court, or in such inferior courts as *Congress* may ordain."

The President, then, can't establish courts-martial.

"The judges of *both* the supreme and inferior courts *shall* hold their offices during good behavior."

Neither Congress nor the President, then, can make a military officer a judge during *will*, nor a provost-marshal a civil court.

"The judicial power shall extend to *all* cases under the Constitution and laws."

The courts of law, therefore, alone can take cognizance of *any* crime against the United States.

"The trial of all crimes, except in case of impeachment, shall be by *jury*."

An Illinois colonel can not, therefore, try any one for any crime.

"No one shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, *except in cases arising in the land and naval service.*"

A man can not then be tried by any court-martial, unless a soldier or sailor; and Congress is especially authorized to make rules for the government and regulation of the land and naval forces; and but for *this*, no soldier could be tried otherwise than by a court of law.

"Congress shall make no law abridging the freedom of speech or of the press."

Even Congress is prohibited from suppressing any newspaper; how can the Executive claim the right?

The fathers of the Constitution assumed that the *habeas corpus* would protect our liberties; but they were unwilling to leave *that* to the discretion of Congress; and they therefore made *it perpetual* by prohibiting its suspension even, except when in cases of rebellion or invasion the public safety may require it.

Congress has not suspended it; it is therefore the right of every man confined contrary to law.

It is perhaps to be regretted that Congress did not at its late session suspend that writ in a portion of the United States and give the President a wider power of arrest than the laws now allow—subject to such safeguards as might protect innocent people from

vexations, or mistaken, or malicious arrests ; but Congress thought *otherwise*—and that confined the President to the limits of the *military* power conferred on him for the suppression of the rebellion ; and that extends only to persons in arms, or those actively aiding and abetting them against the Government. *Such* persons are liable to arrest by military authority under the *law of Congress*. Every one else is amenable only to the *judicial* tribunals and under *judicial* forms.

These provisions exclude martial law and all arbitrary discretion—all exceptional and temporary tribunals—all executive power over the liberty of the citizen.

If the Government can not meet the necessities of the time without transcending these limits, then American republicanism has failed.

If a discretionary power over the liberty of the citizen, or a right to try him by exceptional tribunals is to be tolerated, then we are on the eve of a more dangerous revolution than the one we have undertaken to suppress.

We have abandoned the attempt to reconcile liberty with a government of law, national existence with the supremacy of law ; we have been driven to invoke the principle of executive discretion in the last resort, and at its will to suspend every guarantee written down in the Constitution to protect the liberty of the individual against executive power.

If it were clear that the national existence demands this sacrifice, while it might be yielded, it would be not the less certain that our system of government has failed.

But if it be not so demanded, and yet the people from negligence, or indolence, or weariness of the perpetual demands on their time and attention for the actual conduct of the Government by law and on its own principles, tolerate or invite these intrusions of arbitrary will on the domains of law—whether those intrusions result from the indifference of those in power, or their obedience to popular clamor, then it is not less certain that our Government has failed in fact—failed because the people lacked republican spirit, energy, and vigilance.

And if this system of *law* have failed, there is but one alternative. We pass from the constitutional freedom of America to the democratic despotism of France. To that all free government tends in this age. Only England and the United States have avoided it of all modern free nations ; and they have done so, because their lib-

erty was organized in institutions approved by experience, improved by reason, and adhered to by inveterate habit and national pride. Those institutions exclude every element of arbitrary power, and define by law the rights and duties of every man; and when those laws are abandoned, we become as France is. Necessity will be the supreme law—the President its supreme interpreter—its only rule his will—his only limit, what he thinks the people will bear. He will still speak in their name—but he will not execute their written will, but what he divines to be theirs.

This is *democratic* government, but it is not *American republicanism*. It is the system now being inaugurated by the connivance or the blindness of the people.

We are treading the path of the Roman Republic—the history of whose freedom is unconsciously summed up in a single paragraph of Justinian's Institutes, defining the sources of Roman law. Its whole history is there from the day of its vigor and vigilance, when the *law* was the only rule of action, down to its day of lassitude and corruption, when the wearied people had accepted the will of the prince as their only law.

*Lex est quod populus Romanus senatorio magistratu interro-
gante, veluti consule, constituebat.*

*Plebiscitum est quod Plebs plebeio magistratu interrogante, ve-
luti Tribuno, constituebat.*

*Senatus consultum est quod senatus jubet atque constituit. Nam-
quum auctus est populus Romanus in eum modum ut difficile esset
in unum cum convocari legis sancienda causa, aequum visum est
Senatum vice populi consulit.*

*SED ET quod Principi placuit legis habet vigorem, cum *lege regia*,
qua de ejus imperio lata est, *Populus Romanus* ei et in eum omne
imperium suum et potestatem concessit!!*

We have taken our first steps in this downward road. The last six months have laid up a mass of dangerous precedents for future ambition. And after your and my day, when our children shall have inherited the soil without the institutions of their fathers—when it shall have become the settled conviction that the Constitution is made for times of peace, that necessity is paramount to its prohibitions, that the President's discretion is the judge of the necessity and of the measures required to meet it, the learned jurist of some American Justinian will enumerate as of the past the old sources of the law of the Republic—the Constitution and the laws passed in pursuance thereof by Congress—but will tell us that the

frequent necessities of the case, the defects of the written law, the inconvenience of consulting Congress—the greater convenience of Presidential rescripts, epistles, edicts made for the emergency, in the confidence that the people will approve them—these have become the settled substitutes for constitutional legislation; and he will close his summary by those significant words.

“ *SED IT quod Presidenti placuit legis habet vigorem ! !*”

We are taking our first steps toward that dark cavern into which the steps of all free nations before us have strayed, and from which only a few have ever returned, and they seared by the fires of revolution and seared by the chains of their servitude.

These dire calamities we may avoid, if we resolutely adhere to the limits of the Constitution.

Let us appreciate the vast difficulties with which the Administration is called to struggle; let us not judge harshly their errors; let us accord them a generous confidence; but let us require them to grapple with the difficulties according to law—forbid their recurrence to discretionary devices—rigidly repel usurpation under any pretext, at any instigation, even that of the people themselves.

Consistently with our Constitution there can be no such thing as martial law.

Has the Constitution, then, omitted or excluded anything necessary to carry the Republic through this great crisis?

Let us turn to its arsenal, and survey its arms.

We make the war in the name of the Constitution; that Constitution provides that Congress shall guarantee to each State of the Union a republican form of government. Wicked men in all the seceded States have flown in the face of that great fundamental law, and violated the fundamental principle of all republican government, and inaugurated governments in defiance of the supreme law of the land. It is the case in which the Congress of the United States—not by the law of necessity, not by the law of self-preservation, not for the safety of the people, not because the President or the people think it advisable, but according to the written law of the land—are bound to intervene with all their powers of every kind, and guarantee to the people of those States, loyal or rebel, a republican government, controlling the people under the forms of law; and Chief Justice Taney and the Supreme Court have told us so.

“ Unquestionably,” they say, “ a military government established as the permanent government of a State *would not be a republican*

government, and it would be the duty of Congress to overthrow it."

It is therefore the duty of Congress *now to overthrow* the usurping governments in ten rebellious States. And how should it be done? Congress is vested with power to call forth the militia to execute the laws of the Union and to suppress insurrection, as well as to repel invasion. The critical gentlemen who impeach the authority of the Government to use force, acutely distinguish between the rebellion in the Southern States and an insurrection. That is done under the authority of State sovereignty; it is done at the bidding of sovereigns, and therefore it is not insurrection. The Constitution of the United States, and all laws made in pursuance thereof, are the supreme law of the land, anything in the constitution or the laws of any State to the contrary notwithstanding. Let them be as sovereign as they please, when they pass an ordinance of secession it falls before that sovereign clause of the Constitution, and is so much waste paper. [Applause.] Their laws are the acts of a mob, transcending the limits of their power, and flying in the face of the supreme government of the land. If that be supreme, they are subordinate. If Congress is to declare the supreme law, the ordinance of secession is an inferior law. If the judges are to be bound by the laws of Congress, anything in the constitution or laws of the States to the contrary notwithstanding, then the judges are bound to annul and disregard the ordinance of secession, and Congress is bound to interfere the moment a State attempts to override the supreme law of the Republic. And how? By authorizing the President to use the military power of the Republic to compel the *submission* of its enemies, and by such reasonable penalties and forfeitures as will not exasperate and indurate the hostile population. The President, of himself, has no power to do anything. He is the executor of the laws. He has authority to command the army when the army exists, but it can only exist by the law of Congress. He is directed to see that the laws be faithfully executed; but he can execute no law until it exists. Until the laws give him authority to act, he has just as much power as you or I. He is not our master. He has no discretion vested in him. He is bound by the limitations of the law. What that allows him to do, he can do; what it does not allow him to do, he can not do. That is the principle of our republican government. That is the example set by Washington. He was compelled to suppress the Whisky Insurrection, and he did it

in spite of the imperfection of the law, but according to law; yet there are some people who think that George Washington did not make a government that would conduct us through an insurrection. The law of 1795 was passed in his administration and at his instance, he having found in the Whisky Rebellion in Pennsylvania, that the preceding laws upon the statute-book were inadequate for the purpose. Has any historical gentleman here present ever heard that Washington thought the inadequacy of the law a sufficient reason for usurping a power which the Constitution did not grant? No; he did the best he could. He bewailed the inefficiency of the existing law, but he did not venture to supply it by the law of the public safety, by his own ideas of the public necessity, by usurpation. There would have been no difficulty then, if usurpation could always supply a deficiency. But he, the great Father and founder of the Constitution, went to the Senate and House of Representatives, and laid before them, in his formal message, the deficiency of the law under which he had been obliged to struggle with the rebellion which then threatened the existence of the national republic as much as this threatens its existence, and beg them to relieve his successors from the embarrassment to which he had been subjected. And they did it. They who impeach Mr. Lincoln for usurpation shut their eyes to that law. They who say that the Government has no legal authority to use military power to suppress the rebellion, overlook that law. I read to-day the message of the self-styled President of the Confederate States, in which he audaciously says that the President has made war upon them without the authority of Congress. And that very man, when he was Secretary of War, under that very law of 1795, organized those infernal proceedings in Kansas.

What has Congress done? If it has not done enough, it will meet in the course of a few days, and may do more. If it has omitted important measures, it can supply deficiencies. But what it has authorized up to this time is the limit of what it is allowable for the Executive power to do. It has passed a law confiscating part of the property of rebels, and therefore nobody has the right to confiscate all their property. Be it right or wrong, wise or unwise, it is not in the law, and therefore it is forbidden. It has authorized, and in my judgment wisely, the confiscation of property used to promote rebellion, and there it stops—there the President is bound to stop—there the military commanders are bound to stop, whether on a foraging party or otherwise. That is the im-

passable limit of their power. It has enacted that there shall be a blockade of the Southern coast, a cessation of commercial intercourse. That is the greatest stretch of power that Congress has undertaken to exercise touching this subject. In my judgment, it is within its full competency. In my judgment, it was necessary to the accomplishment of the great purpose of preventing military and other supplies from reaching men in arms. It, doubtless, bears hardly on the loyal men of the South who swarm there, as I am proud to know, by thousands, but disarmed, and therefore powerless. [Applause.] And I know that, while they feel the privations, they submit cheerfully to the restriction, for over the glare of the conflagration they still see the dawn of the coming day of liberty. [Applause.] These are two things that Congress has done. What else has it done? Placed a magnificent army at the disposal of the President of the United States, charged to guarantee a republican government to those who now no longer know its blessings, and to extinguish the last spark of rebellion.

Is that army an idle pageant—a holyday parade? Or may it smite with the sword it bears?

The *law* is the only criterion; the law assembles it—the law defines its rights and duties.

Obedience to the Constitution and laws is all the Government has a right to demand.

If individuals refuse obedience, the courts and juries and marshals will compel it.

If numbers combine to resist, the law vests the marshal with the right to summon the power of the county to dispel the array.

But when the unlawful combination swells into insurrection, and overmatches and defies the marshal and his powers, is the Government to submit? When the ordinary civil, judicial, and legal modes of proceeding have failed, the enemies of the Government say that it must stand with its hands by its side and see itself torn limbless. But does the law say that because the courts can render no assistance they can not be opened? On the contrary, when they have been closed, then the law lifts the banner of the Republic, draws the sword, and, still waiting and giving its erring children time for repentance, forbids the use of the drawn sword till the President shall have issued his proclamation, directing the unlawful combinations—not seceded States, but unlawful combinations of men too strong to be dispersed by the marshal—to go to their respective homes. And that Abraham Lincoln did. [Applause.] And when

they did not go to their respective homes, when all the stages of republican forbearance had been passed, when all the forms of law had been duly invoked, and the last remedy was all that remained, he solemnly put forth his proclamation, and by the written law of the land called the children of the Republic to its defense—and they answered by the million. [Applause.] Now, what are they charged to do? What is the reason that military force is allowed at all? Because the civil process has been overborne. What is the purpose of the military force? To disperse armed opposition, that arrests the progress of the marshal, that closes the court of justice, silences the judge on the bench, and renders impossible the ordinary and peaceful enforcement of the law. And what do you want the army to do? To hunt peaceful people, quietly residing at home, whom a marshal with a writ can arrest? Are six hundred thousand men, your sons and brothers, in arms for that? How wretchedly inadequate is the cause! For what, then? It is to scatter the array of armed men; it is to break down a combination of armed force—to break the military power arrayed against the Republic. When that is broken, what stands between the marshal and the person that the law would punish? The right to draw the sword comes from the fact that the law is arrested. The sword must go into its scabbard when the law no longer meets with opposition beyond the power of the marshal to disperse it. This is not martial law; it is the solemn written law of the Republic that armed men shall meet armed men—that they who lift the banner of rebellion shall be met by the banner of the Republic—that they who appeal to arms shall be met in arms. And then when they quote to you, as they do, the language of the Constitution, that no person shall be deprived of life, liberty, or property, without due process of law, I reply that against those in arms against the Government the bayonet is the process of law. [Applause.] A bullet speeds on its mission just as legally as the marshal with his writ. [Applause.] The order to fire on men arrayed against the Government is as much the language of the Constitution of the United States as the order of the marshal to arrest the man named in his process. [Applause.] Let them disperse if they do not wish to be dispersed, and if they will not disperse when commanded, then they draw the fire of the Government—they call down its thunder upon their heads—they necessitate an appeal to the sword. Let them who draw it perish by it. [Applause.] Why talk about that word which is unheard of in republican lands, but is the home-compan-

ion of the despots of Europe—martial law; a state of siege—the will of the commander—the necessity of dooming people to death after they have been arrested by the military authority, because vengeance can not wait the lagging process of trial? When the military array is dispersed, they no longer present opposition to the enforcement of the laws; the necessity of the military force ceases with the dispersion; the right to use it ceases with the necessity; the necessity is limited by the language of the law to combinations too powerful to be suppressed by the ordinary processes of law. That is the true, legal, and constitutional position. Is it not better to keep to the statute-book and the Constitution, than to insult the memory of Washington by supposing that the machinery of his government has failed on its first trial?

And when the army is assembled, what may it rightfully do? Is it subject to the caprice of private owners for ground to encamp on, for positions to fortify, for fields to fight on? Must it confine its march to the public highways? stop to pay toll? [Laughter.] Ask leave to trespass on a gentleman's ground, before it ventures to deploy against an advancing foe? Is it to assess damages for treading down grass before it can throw up a breastwork to protect it from an advancing foe? If the legislature repeal, or the company surrender the charter for the road, is the force stationary, or driven to violate the right of property which the Constitution so formally guarantees? So argue the enemies of the Republic who profess to be the friends of the Constitution; but their argument displays their ignorance only.

The same right which takes land for a railway track against the owner's will, subjects the whole territory to the burden of war at the will of the military authority. It is not a violation of a private right—it is the assertion of the right of eminent domain over the national territory. Is the authority to take a man's property for a railway more imperative than that which allows the Government to defend itself against military power? Before the supreme right of the Government to wage war—foreign or domestic—State lines are obliterated [applause], every division of private property is obliterated, every individual right is subordinated. It is the right of eminent domain of the Republic, asserted in time of war by the highest political authority, the Constitution of the United States. The right to use military force granted in the Constitution must find its interpretation in the laws of tactics and strategy, of projectiles and defenses aga'nt them, the formal evolutions of troops on

the march and on the battle-field, for these things *are war*; these things are the employment of military force; these things are what they meant who framed the Constitution. Every political authority so construes the Constitution; and the judicial agrees with the political department of the Government. The Supreme Court, in sustaining the appeal to arms by Rhode Island, said: "It was a state of war, and the established government resorted to the *rights and usages of war* to maintain itself, and to overcome the unlawful opposition."

The same principle vests a military commander with the right to seize personal property for the use of the Government on sudden and pressing emergencies, when recourse can not be had to public supplies—a right which Butler exercised when he seized the Annapolis railway.

He may destroy property to prevent it falling into the enemy's hands, even when he could not take it for his own use.

But beyond these and the like cases, private property of the citizen, loyal or disloyal, is as sacred in civil war as in foreign war or in peace. Rebellion gives no rights of robbery; but Congress may legalize confiscation—it is not a right of war, it is a penalty attached to crime.

But the right to seize and hold persons in arms, or aiding and abetting them, *is* a right involved in the right to use military force. On that the political authority and the judicial authority agree.

"In that state of things," say the Supreme Court (in a state of civil war), "the officers engaged in its military service might lawfully arrest any one who, from the information before them, they had reasonable grounds to believe *was engaged in the insurrection*."

But when arrested, is he to be discharged at the bidding of any judge on a *habeas corpus*? and can that be prevented only by admitting the President's right to suspend it? On whom does the Constitution confer the right to suspend it? War does not suspend it. Can the President? Blackstone says that in England it is suspended only by act of Parliament. The writ of *habeas corpus* so far as it is applicable, is issued under the language of the statute, and as long as the act is on the statute-book, there is no power in the United States that can arrest the progress of the writ, except in Congress, which may repeal or suspend the privilege for the time being. Where do they get the authority? If it were not prohibited therein specifically, it would result from their right to repeal a statute which they had enacted. You need go no further than that. But the Constitution was careful to secure to us the

right to the writ paramount to the will of Congress, except in cases of invasion and rebellion, where the public safety might require its suspension. When, therefore, those circumstances occur, that writ ought to be suspended. In my judgment, it was a serious oversight or neglect in Congress at the last session not to have suspended it in some parts of the United States, and in respect of some classes of persons. They did not do it; that is their fault. But that does not vest any right to supply their omission in the head of the Executive department of the Government. On this great topic the bar of the United States has been smitten with barrenness or vertigo. Only one discussion of it worthy of the subject and the bar has met my eye, and that was from the justly distinguished Professor Parker, of Harvard University. It is greatly to be regretted that so distinguished a jurist should have dropped an ambiguous doubt of the President's right to suspend the writ—that is, to repeal an act of Congress! Blackstone denies the right to the Crown; Story confines the right to Congress. But no one has quoted the solemn judgment of John Marshall—a man of some repute in his day, and not entirely without weight among men in our times—respecting the Constitution, which he consolidated on the foundations of Washington. The writ was moved for in behalf of Bolman and Swartwout—arrested by a military officer at New Orleans, brought to the District of Columbia, and there, by President Jefferson, delivered to the Court, and committed for trial for treason. The right of the Court to award the writ was denied, and after argument, the Court, by John Marshall, thus delivered the judgment on the authority to suspend the writ:

“If at any time the *public safety* should require the suspension of the powers vested by this act in the courts of the United States, *it is for the Legislature* to say so.

“That question depends on *political considerations*, on which the *Legislature* is to decide. Until the legislative will be expressed, this Court can only see its duty, and *must obey the laws*.

“The motion, therefore, must be granted.”

I think hereafter it will be a stain on any lawyer's reputation to have ascribed to the President that dangerous and unconstitutional discretion.

I presume that argument may be dispensed with after that great authority, but what then? The enemies of the Government draw from that an argument to paralyze the military force of the Government. The President can not suspend the writ of *habeas corpus*;

therefore it can be used to discharge everybody ! But is there no Congress ? Or, is it less trustworthy than the President ? The business—according to those who wish to destroy the Government—of the writ of *habeas corpus*, is to let traitors out ; its great merit is, to turn out those who ought not to be free. I respectfully submit that they have overlooked some very material distinctions. Who is discharged by the writ of *habeas corpus* ? The person who is not confined by law. If, therefore, he ought to have been confined, although he come up under the call of the writ, he will be sent back by the judge. An apprentice, a sailor, a soldier can not be discharged by a writ of *habeas corpus*. Their error is, the assuming that there can be no legal confinement except that which results from legal process. I say that there can be legal confinement which is not the subject of judicial examination and which is not by process of law ; and yet unlimited discretion does not exist in the President to arrest any person of whom he may have suspicion ; but there are rules prescribing the limits of that power of arrest without judicial process, addressed to the President and not to the courts. That gentlemen who profess to be of the straightest sect of the Republicans should prefer to rush to the dangerous discretion of the martial law and indiscriminate authority in the President without limitation, rather than take the trouble to scan the settled law of the Republic as it has been declared by its greatest lights—is one of the dangerous symptoms of the times. The President is authorized by the act of Congress to exercise military power, not against quiet people at home, nor against people who entertain treasonable sentiments, but against *men in arms*, against men aiding and abetting them ; that is, against men engaged actually in the insurrection, men conveying military information or military stores, men sending them provisions—against men doing any *act* of any kind to aid the actual accomplishment of armed rebellion. The military force is directed against *them*. Chief Justice Taney, in a case which has become celebrated, and always unfortunate for the doubt which in some minds it has thrown over the law, previously well settled by both political and judicial authority, by his judgment in the case of Merriman, alarmed and astonished the country, by declaring that there is no authority to hold a prisoner otherwise than by the leave of the courts under judicial process on judicial evidence. Jefferson Davis is now at Bull Run or Manassas Gap. In the course of a few weeks, we trust the bayonets of the Republic will point in that direction. [Applause.] We

hope that superior numbers, great military organization, abundant military materiel, directed by superior military skill and inspired by the love of the Constitution as well as the Union, will soon unite and destroy the Confederate army; and when it is destroyed, if Mr. Jefferson Davis shall happen to be taken prisoner, together with 50,000 of his soldiers, we may expect a writ of *habeas corpus* issued from the Circuit Court of the United States at Richmond, under the protection of United States bayonets, to call all the 50,000 before that court and discharge them, because there is not a magistrate's warrant to hold them. [Laughter.] You may shoot a soldier, but if you do not shoot him, you can not hold him! Why, has everybody forgotten the Dorr rebellion!! On a small scale, in a small but very patriotic State, men raised the arm of rebellion, and the Legislature declared "martial law." That is the first time those ill-omened words—"martial law"—can be found in an American statute; the weed has since spread and is eating out better grass. The governor understood it to mean—not discretionary despotic power above law, but the right to use military power to suppress that insurrection, and he did so; and in the course of his efforts, he forced open a house without a warrant of search and arrested a man who was aiding in the insurrection without a warrant.

The question of the right to do so in this case was taken to the Supreme Court of the United States, and there a judgment was rendered which has acquired more significance by subsequent events than by those which brought it forth. He was arrested by military authority; he was held without process; he was held by a military officer. Was that a violation of the law of the land? What does Chief Justice Taney say in that case—for it was his fortune to pronounce the judgment of the Supreme Court in that case—a judgment which has acquired more significance by recent events than by those which brought it forth.

"It was a state of war, and the established government resorted to the rights and usages of war to maintain itself and to overcome the unlawful opposition. And in that state of things, the officers engaged in its military service might lawfully arrest any one who, from the *information before them*, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do *this*, martial law and the military array of the Gov-

ernment would be mere parade and rather encourage attack than repel it."

No wiser words than those have been said on this delicate subject. First, we learn that when military power has been authorized by law—as Congress has authorized it now—the "military officers" might lawfully arrest—the lawful right is therefore *not* confined to a civil magistrate—"any one who upon *information* before them"—that is, without *sworn* statements of any kind—without legal or sworn testimony—any one "whom they had reasonable grounds to believe"—not any one *proved legally* before a magistrate—"was *engaged* in the insurrection"—not any one of suspicious *opinions*, or *dangerous influence*, or uttering treasonable *sentiments*—but any one *engaged* in the insurrection—that is, when hostility had passed from a mental disposition into the external *act* of hostility; and such persons may be arrested, not merely when openly on the field in arms, but a house may without warrant be *forcibly* broken open and searched, where there were not *sworn* but *reasonable* grounds to believe him concealed.

The rights of the people and of the individual are all defined and guarded in this remarkable judgment; the military power is emancipated from judicial shackles and judicial blindness; and in another passage it is freed from *judicial revision*.

Now, one step farther. The court is speaking of the precise case that we have before us—of a declaration on the part of the President of the existence of circumstances requiring the use of military force—and the question is, whether they are cognizable by the courts at all. The courts proceed according to judicial forms; the political power does not proceed according to judicial forms; it proceeds in an administrative manner, which is equally legal and constitutional, for the Constitution authorizes both. What was Merriman's case? He had aided to burn bridges and prevent the advance of the national troops to Washington, and was actively engaged in that most efficient method of arresting their progress. That case, then, comes within the military right of the President to make a military arrest. What does the Chief Justice of the United States say, touching the right of the court? What was the case of the Baltimore mayor and police commissioners and their marshal of police? They were at the head of an armed force hostile to the United States, which they had actually used for hostile purposes in aid of the insurrection. *They* were subject to military arrest; but after arrest, were they subject to the results of a judicial pro-

cess for their delivery ; or were they liable by *law* of equal dignity to be held in spite of the courts and beyond their jurisdiction, and by a right of which *they* were not entitled even to judge ? Read the judgment of the court limiting its own powers.

" After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right ? "

" If it could, then it would become the duty of the court, provided it come to the conclusion that the President had decided incorrectly, to *discharge* those who were arrested or detained by the troops in the service of the United States. If the *judicial power* EXTENDS SO FAR, the guarantee contained in the Constitution of the United States is a guarantee of *anarchy*, and not of *order*. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at *that time* bound to follow the decision of the political, it must be equally bound when the contest is over."

It can not, when peace is restored, punish as offenses and crimes the act which it before *recognized*, and WAS BOUND TO RECOGNIZE, AS LAWFUL.

A military arrest, therefore, of a person engaged in the insurrection is not only *legal*, but is beyond the cognizance of the courts.

It is true this judgment was rendered when President Tyler was suppressing an insurrection in a free State ; and it may be thought doubtful if the same law apply to President Lincoln suppressing an insurrection in a slave State. The learned reader will, under Lord Coke's advice, note the diversity.

There are those who think against a Southern State the Government has no rights ; there are those who think against a Southern State there are no limits to the authority of the Government. But these sentences cover the whole case ; not by reasoning on my part from the language of the Constitution, not from judges supposed to be favorable to our side of the case, not in a case made in the heat of the time and in the midst of this controversy ; but in a case decided under the presidency of John Tyler—decided when Southerners had the possession of every department of the Government ; when they had the balance of the power in the Supreme Court itself ; when it was their power that was arrested and defied, and when they were charged to execute the law and use the military power of the United States to enforce the laws of the United States. This judgment, rendered by one, perhaps, not too friendly to the United States in this hour of peril, is now the very founda-

tion of the law of the Republic; put there in the administration of John Tyler, as if to provide for the very case—to exclude controversy under changed circumstances. It does not say, that if a man is arrested by the military authority and brought before the court, that the court after inquiry into the justification of the arrest would remand him; but that the court has a right to inquire into the legality of his arrest. It does not say that the court is entitled to inquire by the oath of witnesses, by the process of a magistrate. It says, when the President has acted and men are arrested, that the courts have no right to inquire into the subject at all.

The order of the President is conclusive on the courts; he is exercising a political discretion vested constitutionally by law in him; and for that he is responsible by impeachment in Congress. Now, we begin to understand the power which resides within the Constitution of George Washington, as well as the limitations which, as with bands of iron, bind it down to the necessities of the public service, limiting and excluding everything like mere discretion, everything like mere arbitrary power, and subjecting the liberty of the citizen only to the *written law of the land*.

If, then, after the President's proclamation commanding rebels to disperse and ordering out the militia, a man arrested by the President's order, because engaged in the insurrection, apply for a *habeas corpus*, how shall the law be administered?

By the settled course of the courts, if he show the facts on the petition, the court will refuse the writ.

But if he state a case of illegal arrest, and the court award the writ on the false suggestion, is the military officer to produce the prisoner?

Affordably not; his duty is to return to the court the simple fact that the person is held by the order of the President for being engaged in the insurrection. *That* is a legal and technical answer to the writ; and the court is bound to take official notice of the proclamation declaring the existence of the insurrection—which carries with it by law the right to use military power.

What if the court's attempt to *enforce* the production of the prisoner? It is the legal duty of the officer to resist force by force. Where one is held by authority paramount to the courts, that *fact* is the legal return. It has been so declared by Judge McLean—whose loss the jurisprudence of the country will long feel and deplore; and the eminent tribunal of which he was at once the orna-

ment and pillar, by the mouth of the Chief Justice, has only four years ago instructed us on this momentous question.

A court of Wisconsin, infected by the theories of South Carolina, undertook to compel by *habeas corpus* the discharge of a person held by the United States marshal. The Supreme Court unanimously declared it "the duty of the marshal to make known to the judge or court, by a proper return, the *authority* by which he holds him in custody."

"After the return is made, and the State judge or court judicially apprised that the party is in custody under the *authority of the United States*, they can *proceed no further*. And consequently it is his duty not to take the prisoner, nor suffer him to be taken before a State court or judge upon a *habeas corpus*, issued under State authority."

But what if the State court appeal to force?

"It would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illicit interference."

"No judicial process, *whatever form it may assume*, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond their boundaries is nothing less than lawless violence."

That is the condemnation of the proceedings in the Merriman case; the asserted right to suspend the writ by the President was justly disregarded by the court; but the return showed a military arrest in time of insurrection, of a person engaged in it, by order of the President; and such an arrest was by law beyond the jurisdiction of the court; and the officer was not bound to obey the writ to bring up and hold him for the judgment of the court and take the chances of adjudication for want of legal evidence, although the man might have been arrested upon secret information which would be sufficient to move an army or fight a battle upon, yet not recognized by a court of justice—it was his duty to give the court information of the *authority* under which he was held, and that excluded the right to inquire whether he was held rightfully or wrongfully.

Now, that is the precise condition, in every particular, of the President of the United States, who has seized men in arms against the Government, or men who have been aiding those in arms, and is holding them pending the war. There is no hardship in holding a man who is engaged in arms against the Government; and the right to determine who is in arms against the Government is neces-

sarily exclusively vested in the President when he is directed by law to suppress the insurrection; for before that can be done, he must ascertain who is making it. He can punish no man for *treason*, but he can slay thousands on the field of battle; he can arrest no man because he has committed treason; but he may seize and hold thousands engaged in the insurrection till it is extinguished!

It is the difference between suppression of rebellion and punishment for treason; the power over persons and property incident to military operations allowed by law, and usurpations of power not granted or forbidden.

The President may occupy my house with armed men for defense, he may pull it down to prevent its sheltering the enemy, but he dare not quarter a single soldier in it without my consent; for the Constitution forbids it. He may pull down a printing-office, if required by military operations; he may, if Congress make seditious articles a crime, prosecute an editor; but there is *no* power in the Government to prevent him, or others for him, continuing to publish his paper, or controlling its contents by censorship, for the Constitution forbids it.

The property of rebel and loyal are alike subject to the sudden necessities of war; but the President, in conducting the war, has no right over property because it belongs to a rebel, more than he would have if it belonged to a loyal citizen. He is to make war for suppression, not for punishment; *that* belongs to the *courts*.

But within the scope of warlike operations, the President, by the law of Congress, is paramount to the courts. He is charged with a high discretionary political power, of the propriety of whose exercise the courts are incompetent to judge, as they have repeatedly declared; the courts take the law from the political departments in all such cases. They can recognize no government unless the President has recognized it. They can entertain no question of boundary of the United States other than that recognized by the political departments. They can not question the conduct of the President in declaring a state of insurrection, or in ordering the militia to suppress it; and it is merely another application of the same principle which forbids them to control, arrest, or judge of the justification of any military acts done within the scope of the military authority confided to the President by Congress. The same law which gives the courts their jurisdiction, exempts such acts of the President from their cognizance.

I pray your indulgence for these dry details; but the foundation-stones of the Republic are not polished as the columns and cornices which glitter in the sun; and it is those deep foundations I am exploring.

Gentlemen of the Association, I trust that I have made myself intelligible, but I fear I have wearied you by the dryness of a mere legal discussion, before a mixed and popular audience; but we all profess to be citizens of a great and free government, now engaged in one of those rare crises that every nation has to pass through at some period of its career; and it is well that we should look to the great charter of our liberties, and elevate it, if necessary, in our own estimation, by contemplating the wisdom with which it has foreseen every danger, the amplitude of the powers which it has provided to deal with every contingency, and the discretion it has exhibited in confiding powers to Congress, some with limitations and some without, providing in that way for every contingency that can arise. We may very well spend an hour or two, even if it be in the laborious pursuit of a dry argument, to rid our minds of an impression which has so settled into public conviction among great masses of our countrymen, that the legal authority is not sufficient to deal with the existing danger. It takes away half our republicanism to feel that we put down rebels by a violation of the law. It takes away from the elevation, the dignity, and the superiority of the Government in dealing with them. It is impudently flung into our faces by the message of Jefferson Davis, who speaks about the tyranny of men who are assailing him. I wish the war to be conducted as a war ought to be conducted, which is to determine the life, and not only the life, but that which is more, the freedom of the American people, the reputation of republican government, its respect, its enduring power, and its influence over the nations of the world. There are those abroad who would rejoice at our fall—there are few who would not, except the oppressed of the Old World. In their name I appeal to you—let not the name of the Republic go to Europe humbled by the confession of its own failure. Let it not go shorn of the glory which has made it an ever-present terror to the enemies of liberty abroad. Let it stand glittering in armor, but the armor of the law. Let it stand the emblem of the power of the people to govern themselves, according to laws wisely foreseeing danger, without putting their liberties, their lives, and their honor at the discretion of men no wiser or better than themselves—dictators to supply the want of

foresight in the people. [Applause.] I am as humble as any man in this assembly, but there is no man here good enough to be my master. I respect and confide in the wisdom, resolution, and uprightness of President Lincoln; but President Lincoln is not good enough for my master. [Applause.] I will trust him with the administration of the laws, but I will not trust him to make them, nor beyond them. I will trust him with all the great deposit of power that the Constitution has placed in his hands—that vast power which, when it is called forth in the magnificence of its military array, blinds the eye accustomed only to the habiliments of peace; but I will not add to it a dictatorship—arbitrary and discretionary powers without the guidance and above the control of *written law*. I protest against it in the name of republican liberty. I protest against it in the name of every limitation in the Constitution under which we live. I protest against it in the name of those Englishmen who defied in arms their king, because he claimed over them discretionary, unlimited power; and of those fathers of the Constitution who in this country followed in their footsteps, were lighted by their wisdom, were guided by their example, and embodied in a law paramount to the varying will of the people the necessary restrictions upon the frailties of human nature. I turn with reverence to the great Northern light of the Constitution, the Newton of this great system—which is heaven while it is order, but will be chaos if discretion rule it—to guide my footsteps in this hour of darkness; and with him I read, inscribed on the foundations of the Government, these cardinal principles: first, government by representation; next, that solemn declaration that the will of the majority—not of newspapers nor of public meetings—the will of the majority—not in a fright, not in a panie, not divined from apparent necessity, but solemnly declared according to the forms of law—shall have the force of law; then that there shall be a written constitution, defining and carefully limiting the powers conferred upon the men charged to represent the people, and restricting their discretion. In that great, last legacy of the great Northern statesman, when he was speaking, as it were, to future ages, and telling them, by the grandest enumeration that ever summed up a nation's progress, of the elements of our prosperity, our power, our advancement, and the glories of our achievements—in that great oration he thought it important to call to the minds of his fellow-citizens that these glorious results were not the offspring of mob law, or of arbitrary

discretion, of despotism disguised as democracy, which rules across the water, or of military law, or of law made for the exigency by executive usurpation, or of the law of necessity, or of the law of the safety of the people, but that the fountain from which all flowed was the rigid adherence to *written law, to the will of the people proclaimed in constitutional forms*. It was law so enacted that he proclaimed to be supreme. It was the result of a government so contrived and so administered, one that had attracted the admiration and the envy of the Old World, and was the foundation and prosperity of the New, which he celebrated: and in this his great parting legacy to his countrymen, when he prophesied the endurance of the Republic, it was because these principles were its foundation, and he thought they would not be shaken. It is because these principles have been departed from that the edifice of the Constitution now reels around us. We must recur to them, cling to them, act upon them, if we would maintain the government that we have received from our fathers. It is our liberty that makes us respected and envied, powerful and glorious—our liberty of law in contrast with that which is democratic license, that mere unchecked, uncontrolled, absolute will of a floating majority, rolling over every barrier, where demagogues lash the people into fury in order to accomplish their ambitious purposes. The peculiarity of the American people has always been its adherence and obedience to law, its hesitation, even under the greatest emergencies, to step across the lines of the law. It is only the revolutionary fever of this latter time that has driven for a moment these American ideas and these American feelings from the American heart. It is now time that we should be enabled to show that we not only have the military power to suppress insurrection, but that we can do it clad in the panoply of law. It is only weighty to those who are not yet habituated to wear it; we have proved it on many a field. Let us not throw it off in the day of battle.

The nations of Europe fail in their efforts for republican government, because they are not habituated to the restraints of law self-imposed; they are not habituated to subordinating their will of the moment to the calm judgment which has foreseen and provided for the exigencies of the case. They fail because they admit the law of necessity to control the law of the land, and leave a discretion which is despotism to provide for the emergencies of the moment. It is self-control that is the greatness of the American people. [Applause.] It is obedience to their own law that is

their power. It is because they have declared that their Constitution is the *salus populi*; it is because they adhere to the rule that the *written law* is the voice of the people, it is because they appeal from the hour of passion to the day of calm reflection, that they have proved themselves worthy of the liberty that their fathers conquered for them. When they shall neglect to adhere to that great rule, when they shall no longer be masters over themselves, when they can not stop in a moment of passion to reflect upon the limits they themselves have placed around their passions for their own good, and reverently bow before the holy laws, they can no longer be the peaceful, orderly, progressive, and powerful Republic of Washington. Till now the current of our life has rolled on, quiet and powerful as the Gulf Stream. The storm of party strife has rippled on its surface; the foam of passion has vanished with the storm that caused it; and the great deep, undisturbed, has rolled still, quietly, majestically, and reflecting from its surface the image of liberty robed in law. When you shall upheave its lower depths by the earthquake of revolution, you will have changed its majestic course; you will have dried up the current of your prosperity; you will have closed the sources of your power; and in the place of the vanished waters will appear the lava and scoria which strew the soil of revolutionary Europe.

[Applause.]

THE
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DEVOTED TO
PHONOGRAPHIC REPORTS
OF
SERMONS, ORATIONS,
LECTURES, ADDRESSES.

ANDREW J. GRAHAM AND CHARLES B. COLLAR, REPORTERS.

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CONTENTS OF VOL. II.

	PAGE
ITALIAN INDEPENDENCE. Addresses delivered in New York, February 16, 1860:	
By Rev. Jos. P. THOMPSON, D.D.	9
By Rev. HENRY WARD BEECHER	21
By Rev. HENRY W. BELLows, D.D.	16
By Prof. O. M. MITCHEL.	26
And Letters by Prof. BENJ. SILLIMAN	14
By Hon. GEO. S. HILLARD	15
By Hon. CHARLES SUMNER.	14
SUCCESS OF OUR REPUBLIC. An Oration delivered in Boston, July 4, 1860, by Hon. EDWARD EVERETT	29
THE UNION NOT A COMPACT. A Speech by DANIEL WEBSTER on the <i>Force Bill</i> , in the United States Senate, February 16, 1833, in reply to JOHN C. CALHOUN	53
JACKSON'S PROCLAMATION TO SOUTH CAROLINA IN 1833.....	97
REPLY TO HAYNE. A Speech in the United States Senate, January 26, 1850. By DANIEL WEBSTER.....	117
LA FAYETTE. An Oration delivered in New York and Philadelphia, December, 1860. By CHARLES SUMNER	155
THE CAUSES OF THE AMERICAN CIVIL WAR. A Paper contributed to the London <i>Times</i> by J. LOTHEOP MOTLEY, LL.D., D.C.L.....	207
THE QUESTIONS OF THE DAY. An Address delivered in the Academy of Music, New York, July 4, 1861 (with Appendix). By Hon. EDWARD EVERETT.....	233
PROVIDENCE IN THE WAR. A Thanksgiving Discourse delivered in New York, November 28, 1861. By Rev. S. D. BURCHARD, D.D.	291
THE SOUTHERN REBELLION, AND THE CONSTITUTIONAL POWERS OF THE REPUBLIC FOR ITS SUPPRESSION. An Address before the Mercantile Library Association of Brooklyn, November 26, 1861. By Hon. HENRY WINTER DAVIS	315-346

PUBLISHER'S NOTE TO THE SECOND VOLUME.

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